

Claimant alleges that between September 2005 and November 8, 2005, she injured her upper extremities from repetitive traumas while working for respondent as a brisket trimmer. In the October 24, 2007, Award, Judge Fuller determined claimant had permanent impairment from bilateral carpal tunnel syndrome before she returned to work for respondent in June 2005 and that the work claimant performed during the alleged period of accident in question neither permanently injured nor permanently aggravated her preexisting condition. Consequently, the Judge denied claimant's request for permanent disability benefits.

Claimant contends the Judge erred by finding her bilateral upper extremities did not permanently worsen due to the work she performed for respondent from September 2005 through November 8, 2005. Claimant's arguments are summarized, as follows:

After returning to her prior repetitive work [in June 2005], claimant experienced additional problems with her upper extremities which resulted in *[sic]* additional testing, additional treatment including injections to the wrists, imposition of work restrictions and referral to a hand specialist. It belies logic to suggest that claimant's condition had not worsened. The only explanation for the worsening is the repetitive work.¹

. . . .

Bottom line – the undersigned believes that Ms. Herrera has gotten a raw deal in a very common sequence of events. Claimant has worked in a repetitive job for many years. She voluntarily quit to spend some time at home. She is diabetic and she saw her personal physician [in December 2004] primarily for back pain. During the course of the exam, a discussion occurred about leg and upper extremity “tingling.” The prudent physician wanted to make sure that claimant was not suffering from diabetic neuropathy. Nerve conduction studies were performed and possible carpal tunnel syndrome was diagnosed. Very limited treatment was provided which apparently resulted in a reduction of symptoms such that no further investigation or treatment was needed. Claimant returns to the same repetitive work and her hands and arms discomfort become *the* presenting symptom. She reports the injury, is terminated by [respondent] NBP, and ALJ Fuller denied compensation because two nerve conduction studies have not changed. We believe there are other factors which have changed and that the facts support an award. . . .²

Accordingly, claimant requests the Board to award her permanent disability benefits for her injuries. At oral argument before the Board, claimant suggested the Board should adopt the opinions of her medical expert, Dr. Pedro A. Murati, and, therefore, award her disability benefits for a 23 percent whole person impairment.

Conversely, respondent and its insurance carrier request the Board to affirm the denial of permanent disability benefits. They argue claimant did not sustain any additional injury to her upper extremities while working for respondent between June 2005 and November 8, 2005, and, therefore, she should not receive any permanent disability benefits. They argue all of claimant's injury and impairment occurred before June 2005

¹ Claimant's Brief at 5 (filed Dec. 13, 2007).

² *Id.* at 7, 8.

and, therefore, her claim for permanent disability benefits should be denied. In the alternative, should the Board find claimant did aggravate her upper extremities at work during the period in question, respondent and its insurance carrier argue she only temporarily aggravated her upper extremities and, therefore, she would not be entitled to receive permanent disability benefits as there was no increase in her permanent impairment.

The only issues before the Board on this appeal are whether claimant sustained increased permanent impairment working for respondent between June 2005 and November 8, 2005, and, if so, what award of permanent disability benefits should claimant receive in this claim after applying K.S.A. 2005 Supp. 44-501(c) and reducing the award by her preexisting impairment, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, the Board finds and concludes the Award should be modified to correct the average weekly wage and to grant claimant future medical benefits upon proper application and approval but the Award should otherwise be affirmed.

Claimant worked for respondent as a brisket trimmer from September 1994 through November 2004, when she voluntarily quit. But claimant returned to work for respondent on June 20, 2005, and worked as a brisket trimmer through November 8, 2005, when she was terminated for allegedly falsifying a medical history questionnaire. In this proceeding, claimant alleges she injured her hands and arms during that last period of employment. The parties stipulated October 27, 2005, should be considered the date of accident for purposes of this claim. The parties also stipulated at oral argument before the Board that claimant's average weekly wage for purposes of this claim was \$535.21.

In 1994, while working for respondent the first time, claimant received conservative medical treatment for her hands and arms. Claimant does not recall how long she received medical treatment, whether she was restricted from performing her work, or whether she was given an impairment rating for her condition. Nonetheless, claimant performed her job trimming briskets through November 2004 when she voluntarily terminated her employment with respondent.

In late 2004, after terminating her employment, claimant developed some numbness and tingling in her hands and feet. Accordingly, claimant sought treatment with her personal physician, Dr. Varinder Gill, whom she saw on December 14, 2004. The doctor's nurse conducted nerve conduction studies, which were consistent with mild bilateral carpal tunnel syndrome. Dr. Gill recommended that claimant wear wrist splints at night, which she did and which she continued to do through the date of her May 2007 regular hearing. In

addition, the doctor advised claimant he would refer her to a hand specialist if her symptoms did not resolve within 30 days. Although her symptoms did not resolve, claimant did not return to Dr. Gill between December 22, 2004, and early October 2005.

Between November 2004 and mid-June 2005, claimant was not employed. On June 20, 2005, however, claimant resumed working for respondent as a brisket trimmer. During the application process, claimant underwent and passed a preemployment physical. After working for several months, claimant developed increased symptoms in her hands and arms. Consequently, on October 4, 2005, claimant returned to Dr. Gill with complaints of numbness and tingling in her hands. The doctor then performed another nerve conduction test of claimant's upper extremities and on October 25, 2005, the doctor injected claimant's wrists.

On November 2, 2005, claimant advised respondent of her wrist symptoms. And on November 8, 2005, she was terminated.

Respondent eventually referred claimant to a Dr. Herrington or Harrington, who recommended carpal tunnel release surgery, which she declined.

Nature and extent of impairment

Dr. Gill, who is a board-certified internist and who treated claimant in both December 2004 and October 2005, is unable to state whether claimant's bilateral upper extremity condition was worse in October 2005 than it was in December 2004. The doctor, however, testified the results from the December 2004 nerve conduction studies were not significantly different than the results from the October 2005 studies. Dr. Gill did not provide an opinion regarding claimant's permanent functional impairment.

At her attorney's request, claimant was examined and evaluated by Dr. Pedro A. Murati in July 2006. Dr. Murati concluded claimant had myofascial pain syndrome in both shoulders and the upper back, bilateral carpal tunnel syndrome, and tenosynovitis of the right second digit. The doctor's July 11, 2006, medical report indicated claimant complained of bilateral hand and wrist pain that radiated into her shoulders and neck, tingling and numbness in both hands and in her fingers, and locking of the bilateral *third* digits.

Dr. Murati rated claimant under the *AMA Guides*³ as having a 23 percent whole person functional impairment. That rating includes five percent to the whole person for

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

myofascial pain syndrome in the thoracic paraspinals; 10 percent to the right upper extremity for carpal tunnel syndrome; six percent to the right upper extremity for mild instability in the wrist; four percent to the right upper extremity for tenosynovitis of the right *second* digit; 10 percent to the left upper extremity for carpal tunnel syndrome; and six percent impairment to the left upper extremity for wrist instability.

In formulating the above ratings, Dr. Murati relied in part on records from a Dr. Rane, who reportedly examined claimant in October 2005 and concluded claimant had bilateral carpal tunnel syndrome and locking in her right middle finger. According to Dr. Murati's July 11, 2006, medical report, Dr. Rane scheduled claimant for right carpal tunnel release surgery and trigger middle finger release before respondent cancelled the surgery and sent claimant to Dr. Herrington.⁴

Dr. Murati attributed claimant's impairment to the work claimant performed for respondent between June 2005 and November 8, 2005. Nonetheless, the doctor agreed claimant probably had some carpal tunnel syndrome before June 2005, but her work after that date definitely aggravated her condition.

Dr. Murati, who is board-certified in physical medicine and rehabilitation, criticized the nerve conduction studies Dr. Gill had performed on claimant. Dr. Murati believes Dr. Gill did not have any formal training in nerve conduction studies and that the results from Dr. Gill's tests indicated the active electrodes were not properly placed. In addition, Dr. Murati criticized both Dr. Gill's machine and software. According to Dr. Murati, the machine was very basic and the software that produced the report was awful. Finally, Dr. Murati suggested that Dr. Gill should not perform these tests. Consequently, Dr. Murati believes the results from the nerve conduction studies performed in Dr. Gill's office are neither relevant nor helpful in assessing claimant's impairment.

At respondent's request, claimant was examined and evaluated by Dr. Terrence Pratt. Dr. Pratt examined claimant in October 2006 and rated her under the *AMA Guides* as having a 10 percent impairment to her right upper extremity and a 10 percent impairment to her left upper extremity due to bilateral carpal tunnel syndrome. The doctor did not find triggering in claimant's middle fingers and, therefore, he did not rate that condition. Further, Dr. Pratt did not rate claimant's cervical spine despite finding claimant had intermittent cervical complaints.

Dr. Pratt concluded claimant's functional impairment did not increase while she worked for respondent from June 2005 through November 8, 2005. The doctor reasoned claimant had mild bilateral carpal tunnel syndrome in both December 2004 and

⁴ Murati Depo., Ex. 2 at 1.

October 2005, as indicated by the two nerve conduction studies. In addition, claimant advised Dr. Pratt that her upper extremities were still symptomatic when she returned to work for respondent in June 2005.

Dr. Pratt's October 19, 2006, report also indicated claimant saw Dr. Herrington in February 2006 with complaints of bilateral wrist pain that radiated into her fingers and pain in her shoulders and the back of her neck. Dr. Herrington noted claimant's "diabetic history would predispose her to the condition, but it probably was worsened by work activities."⁵

Dr. Pratt, who is also board-certified in physical medicine and rehabilitation, did not question or challenge the results from Dr. Gill's nerve conduction studies considering "you have similar tests showing similar things and a similarly trained person doing the assessment."⁶

Considering claimant's testimony regarding her present symptoms and the opinions of the three doctors who testified, the Board finds claimant developed bilateral carpal tunnel syndrome that was aggravated by the work she performed for respondent between June 2005 and November 8, 2005. Due to her bilateral carpal tunnel syndrome, claimant now has a 10 percent impairment to her right upper extremity and a 10 percent impairment to her left upper extremity. The record fails to establish that claimant has sustained permanent impairment to her neck or shoulders due to the work she performed for respondent.

Preexisting impairment

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.⁷

The statute does not require that the preexisting impairment was actually rated or that the worker was given formal medical restrictions. But it is critical that the condition

⁵ Pratt Depo., Ex. 2 at 4.

⁶ *Id.* at 28.

⁷ K.S.A. 2005 Supp. 44-501(c).

actually constituted a rateable impairment. The greater weight of the evidence supports Dr. Pratt's conclusion that claimant's functional impairment ratings to her upper extremities did not increase due to the work she performed for respondent after June 2005. Claimant's condition was symptomatic by December 2004 and the nerve conduction tests administered at that time indicated she had mild bilateral carpal tunnel syndrome. And claimant's upper extremities remained symptomatic over the next several months despite her leaving respondent's employment. In short, the evidence indicates claimant had a 10 percent impairment to her right upper extremity and a 10 percent impairment to her left upper extremity due to mild bilateral carpal tunnel syndrome before she began working for respondent in June 2005. Accordingly, claimant is not entitled to receive permanent disability benefits in this claim.

The Board recognizes this is a harsh result as claimant has sustained a career-altering injury due to the work she performed for respondent. In this instance, the injured worker bears the brunt of an occupational injury rather than industry, which is contrary to the intent of the Workers Compensation Act. Nevertheless, the remedy lies with the legislature.

In conclusion, claimant developed bilateral carpal tunnel syndrome due to the work she performed for respondent as a brisket trimmer. But the work she performed for respondent after June 2005 did not increase her permanent impairment. Consequently, claimant is denied permanent disability benefits for her bilateral carpal tunnel syndrome after her preexisting impairment is deducted under K.S.A. 2005 Supp. 44-501(c).

The Board, however, finds claimant is entitled to additional medical benefits upon proper application to the Director of the Division of Workers Compensation. The evidence establishes that claimant's symptoms worsened after she resumed her employment with respondent in June 2005, which ultimately led to surgery being recommended. Although claimant's functional impairment did not increase, it does not lessen the fact she sustained additional injury and aggravation due to the work she performed between June 2005 and her last day of working for respondent on November 8, 2005. The Workers Compensation Act provides that an employer is responsible for providing an injured worker with such medical treatment that is reasonably necessary to cure and relieve the injured worker from the effects of the injury.⁸ And that medical treatment includes additional or post-award medical treatment.⁹

⁸ K.S.A. 2006 Supp. 44-510h.

⁹ K.S.A. 2006 Supp. 44-510k.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁰ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the October 24, 2007, Award entered by Judge Fuller to correct the average weekly wage to \$535.21 and to grant claimant future medical benefits upon proper application and approval. The Board affirms the remainder of the Award.

IT IS SO ORDERED.

Dated this ____ day of February, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
Shirla R. McQueen, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge

¹⁰ K.S.A. 2006 Supp. 44-555c(k).